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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN PATRICK GIER, Defendant and Appellant.	C078304 (Super. Ct. No. MF036121A)

A jury convicted defendant Steven Patrick Gier of first degree burglary, and the trial court found that he had a prior strike conviction, a prior serious felony conviction, and two prior prison terms. The trial court sentenced him to nine years in state prison.

Defendant now contends:

1. The trial court erred in failing to conduct a closed hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), violating defendant's constitutional rights to counsel and due process. In the alternative, defense counsel rendered ineffective assistance in failing to request a closed hearing.

2. The trial court erred in appointing a second defense counsel to investigate the first defense counsel without relieving the first counsel, violating defendant's constitutional rights to counsel and due process. And defense counsel rendered ineffective assistance in failing to request that substitute counsel be appointed for all purposes.

3. The first defense counsel rendered ineffective assistance by acting in direct conflict to defendant's interests.

4. The errors require remand for appointment of new counsel and a new hearing on posttrial motions.

Finding no prejudicial error, we will affirm the judgment.

BACKGROUND

Allen Holbrook found defendant in Holbrook's garage on the afternoon of March 23, 2013. Defendant fled on a bicycle with Holbrook in pursuit. Defendant's hat flew off and Holbrook retrieved it. Failing to catch defendant, Holbrook returned home and called the police.

Holbrook described the suspect as a white male, about 30 years old. He said the suspect was wearing dark jeans and a grey patterned camouflage jacket or sweatshirt. Within minutes, an officer saw defendant riding a bicycle near the scene of the burglary and followed him to a nearby department store. During a brief chase, defendant hid his backpack in a planter. Officers caught defendant.

Holbrook went with an officer to the department store and positively identified defendant. Defendant was wearing a T-shirt but not a jacket or sweatshirt. Among other things, the following items were found in defendant's backpack and returned to Holbrook: a GPS unit, a two-way radio, a portable electric supply that had been taken from Holbrook's truck in the garage; and a garage door opener and house key taken from Holbrook's spouse's car parked in the driveway. A camouflage jacket found in the backpack was identified by Holbrook as the one defendant had been wearing when he was in Holbrook's garage.

DNA analysis of the hat revealed that defendant (and 22,000 other Caucasians) could not be excluded as a contributor to the DNA found on the headband.

The jury convicted defendant of first degree burglary (Pen. Code, § 459 -- count 1) and found that another person, other than an accomplice, was present during the burglary.

In bifurcated proceedings, the trial court found true allegations that defendant had a prior strike conviction, a prior serious felony conviction, and two prior prison terms.

Appointed counsel, Russell Humphrey, filed a motion for a new trial, arguing the verdict was contrary to the evidence and denied defendant a fair trial. At a hearing on the motion, Humphrey said defendant wanted to address another issue, that Humphrey was ineffective during trial because some evidence was not introduced. The trial court allowed defendant to orally state his complaints in the presence of the prosecutor.

Defendant said Humphrey had been his attorney for a short time before trial after having another attorney for a year, and Humphrey never talked to defendant about the case. According to defendant, arrangements should have been made to interview, and conduct DNA testing upon, the person who threw the backpack at defendant in the department store parking lot. Defendant said the 911 call was not introduced even though it provided a different description than the witnesses, and Humphrey never advised him about trial procedures, including whether defendant could take notes.

The trial court said it had sufficient time to consider the written new trial motion, but wanted to continue the matter to consider the complaints presented by defendant at the hearing. At the next hearing on the new trial motion, the trial court appointed an additional attorney and stated that Humphrey was not relieved. Citing *People v. Richardson* (2009) 171 Cal.App.4th 479 (*Richardson*), the trial court appointed Kristine Eagle to review defendant's complaints, notify the court of her findings, and determine whether a "further new trial motion needs to be prepared."

The matter was continued three times (on June 11, 2014, July 28, 2014, and September 8, 2014). On October 9, 2014, Eagle filed a motion for new trial based on ineffective assistance of counsel, alleging that Humphrey failed to visit defendant in jail prior to trial. Eagle attached an unsigned affidavit from defendant listing his complaints, explaining that she expected defendant to so testify under oath and she expected the prosecutor would call Humphrey to testify.

Defendant testified at the hearing on the second new trial motion. He claimed Humphrey never visited him in jail, but defendant admitted seeing Humphrey two times in court prior to trial. Defendant said they never talked about the police report. At the first meeting in court, Humphrey said he would see defendant and would send his investigator. Defendant asked about a drug program. They did not discuss the case at the second meeting in court or at trial assignment. But defendant admitted Humphrey's investigator visited defendant three times. On the first visit, the investigator gave defendant discovery including a number of police reports. On the second visit, the investigator and defendant listened to the 911 tape which defendant had requested in his first visit with the investigator. Defendant asked the investigator to get the contents of the backpack fingerprinted in order to show that defendant did not have any contact with the contents. On the third visit, the investigator discussed defendant's clothing sizes. According to defendant, he asked whether Humphrey would be visiting and the investigator responded that Humphrey was too busy.

Defendant testified that trial began shortly thereafter and Humphrey did not discuss the case with defendant during jury selection. Defendant admitted he did not ask Humphrey any questions during jury selection or opening statements. Defendant believed the tape of the 911 call was important for the defense, but when he asked Humphrey to play the tape, Humphrey said there was not enough time. After jury began deliberations, Humphrey informed the trial court in the prosecutor's presence that defendant wanted Humphrey to present evidence of the 911 call because it indicated that a witness described a different colored T-shirt. Humphrey said he decided against presenting the evidence because it would distract from the case as presented, which appeared to be going better than expected.

Defendant also testified at the hearing on the second new trial motion that he thought a suppression motion should have been filed to exclude the backpack and its contents. Defendant asked Denise Pereira, his first attorney, and later Humphrey's

investigator to fingerprint the backpack. Defendant claimed there were items in the backpack in addition to the items returned to Holbrook, and the backpack had not been handled properly.

In addition, defendant complained that a photo lineup or a live lineup was never conducted even though Humphrey's investigator thought they might be a good idea because defendant claimed an individual named James Pause was involved in the crime. Pereira's investigator interviewed Pause and filed a report that defendant received in a packet from Humphrey's investigator.

Defendant said Humphrey advised him it would not be beneficial for defendant to testify. Defendant admitted he had prior convictions. But he complained that Humphrey did not present the following evidence: Holbrook described the suspect's bike as light-colored, but defendant's bike was black and silver; defendant believed the police tampered with the camouflage jacket and removed a black shirt covering it; and a diagram or map showed where defendant claimed he had been prior to riding the bike to the department store. Defendant also complained he was not provided with a pencil and paper to take notes and to communicate with Humphrey. He did not know he could take notes but admitted he never asked Humphrey about it. Defendant further complained that the DNA of James Pause was never checked against the DNA on the hat.

On cross-examination, defendant admitted he supported his methamphetamine use in part by stealing, he had a prior conviction for residential burglary, and his drug problem affected his memory.

The prosecutor called Humphrey to testify without objection by Eagle or defendant. Humphrey said he was appointed after Pereira was relieved. Humphrey discussed the case with Pereira and received discovery, reports of interviews with defendant's witnesses, and DNA evidence. Humphrey had been an attorney for about 14 years with about 40 criminal trials as a prosecutor and about 50 criminal trials as a defense attorney. He believed he had adequate time to speak with defendant. Humphrey

investigated defendant's claim that someone else was responsible for the crime, but it did not lead anywhere. Humphrey did not recall every time he spoke with defendant but he did remember he was prepared for trial. Humphrey discussed defendant's desire for a drug program with the prosecutor. He also had his investigator speak with defendant. Humphrey assumed he had gone over the police report with defendant, as was his general habit, but he did not do so in every case so he would rely on what defendant said in that regard. Humphrey did not introduce the 911 tape because the case had been presented in trial better than what had appeared in the reports, and he thought he had expressed that to defendant. He did not believe he needed to "get in the weeds" with the 911 tape and start splitting hairs about whether it was a dark green or brown sweatshirt. On cross-examination, Humphrey said he believed there were more than two court dates prior to trial and recalled speaking with defendant.

The hearing on the second new trial motion was continued and Eagle filed supplemental points and authorities arguing defendant was not adequately advised of his right to testify at trial. At the continued hearing, Humphrey was called again by the prosecutor and testified about his advice. Humphrey said it was his custom and habit to advise a client of his or her right to testify, that he could not remember a case where the right was not discussed with the client, and that he prefers to have a client testify unless there is "something extraordinary." Humphrey believed defendant's case was one of identification and defendant had a prior first degree burglary conviction which weighed against defendant testifying. Humphrey did not remember specifically telling defendant it would not be a good idea to testify but said the discussion would have been brief because defendant was not very talkative.

The trial court granted Eagle's request for judicial notice of the case file, which reflected that Humphrey was appointed on February 4, 2014; defendant was present at trial setting on February 14, 2014; defendant was not present for the next court date on March 28, 2014; and trial commenced on April 2, 2014.

The trial court denied the first new trial motion filed by Humphrey, in which defendant argued the trial evidence was insufficient to sustain the verdict because eyewitness testimony was unreliable and could not be reconciled with the defense DNA expert's testimony. The trial court found the trial evidence sufficient to sustain the verdict. It found the eyewitness testimony credible and not inconsistent with the testimony of defendant's expert.

The trial court also denied the second new trial motion filed by Eagle, in which defendant argued he was inadequately advised of his right to testify at trial and his trial counsel was ineffective in assisting him before and during trial. Among other things, the trial court ruled Humphrey made a tactical determination that defendant should not testify, there was no evidence defendant objected to that determination, there was no evidence defendant's testimony would have made a difference in the case, and defendant would have been subjected to cross-examination regarding his felony criminal history. The trial court found Humphrey made other tactical decisions during the trial, and while it may have been a better practice for Humphrey to visit defendant in jail, his investigator visited defendant three times. The trial court found that defendant was aware of his rights and if unsatisfied with counsel's communication could have requested a *Marsden* hearing prior to trial, having already substituted counsel through a *Marsden* hearing.

The trial court found that Humphrey appeared familiar with the case, was an experienced criminal trial attorney, his investigator was in contact with defendant, and Humphrey indicated he was ready for trial. The trial court said Humphrey thoroughly questioned each prosecution witness, brought an expert to testify on defendant's behalf, and there was a meaningful adversarial testing. Based on the totality of the evidence, the trial court found that Humphrey was competent, acted as a conscientious, diligent advocate on defendant's behalf, and there was no prejudice. The trial court noted that defendant was never denied a writing utensil or paper at any hearing or at trial. The trial court continued the matter for sentencing and relieved Eagle.

The probation report indicated that defendant's criminal history included eight felonies, nine misdemeanors, and 10 probation/parole violations. The prosecutor sought a 19-year prison sentence; Humphrey requested the low term or in the alternative, a suspended prison term with drug treatment. At sentencing, the trial court began by expressing the court's intended sentence, stating defendant was ineligible for probation and the trial court intended to impose the low term of two years, doubled for the prior strike conviction, plus a five-year enhancement for the prior serious felony. The trial court also intended to strike the two prior prison term findings pursuant to Penal Code section 1385, and it set forth the reasons on the record. Humphrey was prepared to submit the matter but asked the trial court to consider the statements of defendant's family members. The trial court agreed and heard the statements. The trial court then imposed the indicated sentence, sentencing defendant to state prison for an aggregate term of nine years.

DISCUSSION

I

Defendant contends the trial court erred in failing to conduct a closed *Marsden* hearing, or in the alternative, that defense counsel rendered ineffective assistance in failing to request a closed hearing.

The trial court did not err in failing to hold a *Marsden* hearing because defendant never asked to discharge Humphrey. Defendant knew the procedure, having made a *Marsden* motion on previous occasions. His last motion was granted: Pereira was relieved and Humphrey was appointed. Because there was never a clear indication that defendant desired to replace Humphrey, the right to a *Marsden* hearing was not triggered. "[A] trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel. The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a

Marsden hearing." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. omitted.) "[A] proper and formal legal motion" is not required, but the defendant must provide "at least some clear indication . . . that he wants a substitute attorney." (*Id.* at p. 281, fn. 8; see *People v. Sanchez* (2011) 53 Cal.4th 80, 89-90 (*Sanchez*).) "Mere grumbling" about counsel's failures is insufficient to invoke a *Marsden* hearing. (*People v. Lee* (2002) 95 Cal.App.4th 772, 780.) "[W]e will not find error on the part of the trial court for failure to conduct a *Marsden* hearing in the absence of evidence that defendant made his desire for appointment of new counsel known to the court." (*Richardson, supra,* 171 Cal.App.4th at p. 484; see also *People v. Gay* (1990) 221 Cal.App.3d 1065, 1070 ["A trial judge should not be obligated to take steps toward appointing new counsel where defendant does not even seek such relief."].)

Defendant claims his counsel was ineffective in failing to request a *Marsden* hearing. To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) To show prejudice, defendant must show a reasonable probability that he would have received a more favorable result had counsel's performance not been deficient. (*Strickland*, at pp. 693-694; *Ledesma*, at pp. 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694; accord, *Ledesma*, at p. 218.) There is no need to consider whether counsel's performance was deficient when an ineffective assistance of counsel claim can be resolved on lack of prejudice grounds. (*Strickland*, at p. 697.)

Here, counsel was not deficient because there is no evidence defendant indicated he wanted to discharge or replace Humphrey, let alone discuss his complaints privately in a closed hearing. Defendant cites *People v. Henning* (2009) 178 Cal.App.4th 388, in which the trial judge cleared the courtroom so it could hear from the defendant and his

attorney, preserve the attorney-client privilege, and avoid revealing strategy to the prosecutor. (*Id.* at p. 404.) That case is inapposite. The limited information disclosed by defendant in this case did not provide any advantage to the prosecutor, who had already proved the People's case. (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814-815; *People v. Madrid* (1985) 168 Cal.App.3d 14, 18-19.) Defendant asserted his complaints after the verdict in an effort to secure a new trial. Defendant has failed to show counsel's performance was deficient in not requesting a closed hearing.

II

Defendant next contends the trial court erred in appointing Eagle to investigate Humphrey without relieving Humphrey, thereby violating defendant's constitutional rights to counsel and due process. He also claims defense counsel rendered ineffective assistance in failing to request that substitute counsel be appointed for all purposes.

Defendant cites *Sanchez, supra*, 53 Cal.4th 80, in which the California Supreme Court disapproved the practice of appointing counsel to investigate a defendant's request for new trial or plea withdrawal. (*Id*. at pp. 89-90.) But the Supreme Court explained that "if a defendant requests substitute counsel" and makes a showing that his right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. (*Id.* at p. 90.) As we have explained, defendant never requested substitute counsel in place of Humphrey. Rather, defendant asserted ineffective assistance as a basis for a new trial. Defendant does not cite authority for the proposition that his right to counsel was violated under these particular circumstances, particularly where the trial court found Humphrey was not deficient and defendant suffered no prejudice. And he has failed to demonstrate on this record that counsel was deficient in failing to request substitute counsel for all purposes.

III

Defendant next contends Humphrey rendered ineffective assistance by acting in direct conflict to defendant's interests.

"A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. This constitutional right includes the correlative right to representation free from any conflict of interest that undermines counsel's loyalty to his or her client. [Citations.] 'It has long been held that under both Constitutions, a defendant is deprived of his or her constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant.' [Citation.] 'As a general proposition, such conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests. [Citation.]" ' [Citations.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*).)

"In *Mickens v. Taylor* (2002) 535 U.S. 162 [152 L.Ed.2d 291, 122 S.Ct. 1237] (*Mickens*), the high court confirmed that claims of Sixth Amendment violation based on conflicts of interest are a category of ineffective assistance of counsel claims that, under *Strickland, supra*, 466 U.S. at page 694, generally require a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. [Citations.] In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest 'that affected counsel's performance -- as opposed to a mere theoretical division of loyalties.' [Citations.] '[I]nquiry into actual conflict [does not require] something separate and apart from adverse effect.' [Citation.] 'An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.' [Citation.]" (*Doolin, supra*, 45 Cal.4th at pp. 417-418, italics omitted.)

"[A] determination of whether counsel's performance was 'adversely affected' under the federal standard 'requires an inquiry into whether counsel "pulled his punches,"

i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict. [Citation.] In undertaking such an inquiry, we are . . . bound by the record." (*Doolin, supra,* 45 Cal.4th at p. 418.) *Doolin* "adopted the federal constitutional standard for evaluating claims of conflict of interest under our state Constitution" so we "analyze defendant's claims under only the federal standard." (*Id.* at p. 419.) "[A] presumption of prejudice applies when defense counsel 'actively represented conflicting interests,' " that is, multiple concurrent representation. (*Id.* at p. 418.) Otherwise, defendant must demonstrate "outcome-determinative prejudice." (*Id.* at p. 420.)

Here, defendant has failed to demonstrate that Humphrey was deficient or that but for the alleged deficiencies, the result of the trial, the new trial motions, or sentencing would have been different. As the trial court found, Humphrey competently represented defendant. In any event, the evidence against defendant was overwhelming. Defendant fled Holbrook's home on a bicycle. Holbrook called the police and described the suspect. Defendant was seen by the police riding a bicycle within minutes and near Holbrook's home. Defendant was followed by police, was seen discarding a backpack along his route, and then was caught. He was positively identified by Holbrook. The backpack contained Holbrook's property as well as the camouflaged jacket that Holbrook had described as having been worn by the suspect.

Defendant had an additional attorney, Eagle, to present a second new trial motion on the ground of ineffective assistance by Humphrey. The record on appeal does not reflect that anyone asked for Humphrey to be relieved. Eagle acknowledged that Humphrey would be called by the prosecutor to refute defendant's claims of ineffective assistance, as is required. A new trial motion must be "part of a fully adversarial proceeding" and defendant waives his attorney-client privilege insofar as he places it at issue. (*People v. Smith* (1993) 6 Cal.4th 684, 694, fn. 2; see *People v. Dennis* (1986) 177 Cal.App.3d 863, 873.)

At sentencing, the prosecutor sought 19 years in prison but the trial court imposed nine years. Humphrey filed a statement in mitigation seeking the low term or in the alternative, a drug program with a suspended sentence. Due to defendant's extensive criminal history, the trial court did not dismiss his prior strike conviction, but the trial court did strike the two prior prison term findings. The trial court could not strike the five-year enhancement for the prior serious felony. (Pen. Code, § 1385, subd. (b).) Defendant has not established ineffective assistance of counsel.

IV

Defendant contends the asserted errors require remand for appointment of new counsel and a new hearing on posttrial motions. Because we have determined defendant's claims lack merit, this contention fails as well.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
NICHOLSON, Acting P. J.

/S/
ROBIE, J.